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in opinion

263H

November 8, 1957

Mr. James J. Barry, Commissioner
Welfare Department
State House Annex
Concord, New Hampshire

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CONCORD, N.H.

Dear Mr. Barry:

I answer your letter of November 7, 1957 as follows.

In response to your first inquiry please be advised that the Board cannot, in our judgment, make a rule or regulation that the decision of the local health officer is binding upon the Board - not only in the event of a hearing via appeal but in any instance. This conclusion is based upon the clearly expressed legislative intent that the final responsibility for the granting of a license should be that of the Commissioner under rules and regulations promulgated by the Board and subject to statutory appeal. The Commissioner, may, of course, have the assistance of others - whether or not on his staff - in ascertaining the relevant facts concerning a particular application. But the judgment of another cannot be interposed. Thus your present rule requires that an application have the approval of the local health officer. The effect of this rule is to condition the receipt of a license upon a factor not required by statute, and upon the judgment of an officer not authorized by law in this respect. It is noted in passing that by RSA 170:7 the local Board of Health must be notified of the granting of a license. It is significant that such notification is to be made after the permit is granted, not before. On this aspect, I would conclude that an applicant might be required to secure a statement, if possible, from the local health officer concerning the fitness, from a health point of view, of the applicant. But most clearly not his approval.

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The answer to your second inquiry is, of course, embraced in the answer to the first. Most clearly the local health officer stands in no better position than other observers to measure the quality of the social habits and other character traits of applicants. His comments in this regard may be received and given such weight as you feel they deserve. But just as the local health officer's judgment on whether or not an applicant should have a license is inconclusive, so also is his views concerning the social habits and character traits of the applicant not binding upon the Commissioner.

I return your booklet containing the Rules and Regulations which forwarded with your letter.

Very truly yours,

Warren E. Waters
Deputy Attorney General

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Encl.